No. 49845-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO BRADLEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF APPELLANT

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A. INTRODUCTION

Threats made to a "criminal justice participant," such as a police officer, constitute felony harassment under RCW 9A.46.020(2)(b) only when it was apparent to the officer that the individual had the present *and* future ability to carry out the threat. After Antonio Bradley was arrested, handcuffed, and placed in the back of Officer Bryan Pitman's patrol car, Mr. Bradley threatened the officer that the next time he saw him, he was going to kill him. Following a bench trial, the trial court found only that Officer Pitman believed Mr. Bradley had the future ability to carry out this threat. Because the State failed to meet its burden to prove Mr. Bradley committed felony harassment against a criminal justice participant, this Court should reverse.

B. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence that Mr. Bradley committed felony harassment against a criminal justice participant.

2. The trial court erred when it entered Conclusion of Law 4. CP 36.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The plain language of the felony harassment statute, RCW 9A.45.020(2)(b), requires that an individual who threatens a police officer must have the present *and* future ability to carry out the threat. Where the statute's language is unambiguous, should this Court find the statute requires the State to prove both that the individual had the present ability and the future ability to carry out the threat?

2. The due process provisions of the Fourteenth Amendment and of article I, section 3, require the State prove each element of an offense beyond a reasonable doubt. Where the evidence did not show, and the trial court did not find, that Mr. Bradley had the present ability to carry out the threat directed at Officer Pitman, should this Court reverse?

D. STATEMENT OF THE CASE

Officer Bryan Pitman was on his way to work early one morning when he observed a car enter the roadway and expel a large screen of smoke. RP 27. Antonio Bradley was driving the car. RP 32. When Officer Pitman pulled him over, Mr. Bradley immediately provided identification and explained he did not have a valid driver's

license and believed there was likely an outstanding warrant for his arrest. RP 32.

Officer Pitman confirmed that there was, in fact, a warrant for Mr. Bradley's arrest. RP 34. At Officer Pitman's instruction, Mr. Bradley stepped out of the car and allowed himself to be handcuffed without incident. RP 35. Officer Pitman double locked the handcuffs and checked that they fit properly. RP 35.

Mr. Bradley then begged to be released, explaining a family member had recently been killed. RP 36. According to Officer Pitman, after being placed in the back of the patrol car, Mr. Bradley became more upset and began to yell. RP 40. Mr. Bradley made statements Officer Pitman believed were "vague threats" and Officer Pitman ignored him. RP 40-42.

Officer Pitman alleged that Mr. Bradley made a number of angry statements in the car, telling Officer Pitman what he should have done or would like to do to Officer Pitman or to officers in general. RP 40-51. At one point, the officer alleged Mr. Bradley told him "[t]he next time I see you, I am going to kill you. Even if you are walking with your daughter or child, I will kill them, too." RP 47. Upon

arriving at the Pierce County jail, Mr. Bradley was cooperative and followed the officers' instructions. RP 51.

The State charged Mr. Bradley with two counts of felony harassment, one for a threat to kill and the other for a threat against a criminal justice participant. CP 3-4. Mr. Bradley waived his right to a bench trial, requesting the trial judge decide his case instead. RP 7.

The judge found Mr. Bradley guilty on both counts, but later granted the State's motion to vacate count one. CP 11-12, 36. The trial court sentenced Mr. Bradley to 51 months incarceration.[1] CP 20.

E. ARGUMENT

The State did not prove Mr. Bradley committed felony harassment against a criminal justice participant beyond a reasonable doubt.

In 2011, the legislature amended the harassment statute, RCW 9A.46.020, to include additional ways in which the crime of harassment may be prosecuted as a felony. Pursuant to this statute, an individual is guilty of the crime of harassment when, "[w]ithout lawful authority, the person knowingly threatens… to cause bodily injury immediately or in the future to the person threatened or any other person" and "[t]he

[1] The judgment and sentence indicates 51 months was imposed on count I, but this was clearly a clerical error as the judgment and sentence also indicates Mr. Bradley was found guilty only on count II. CP 15, 20.

person by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(a)(i), (1)(b).

Prior to 2011, an individual's conduct rose to the level of a felony if he had previously been convicted of harassment against the same victim or an individual named in a no-contact order, or if the threat to cause bodily injury was a threat to kill. RCW 9A.46.020(2)(b). However, in 2011 the legislature amended the statute to include the following:

> A person who harasses another is guilty of a class C felony if any of the following apply:
>
> …
>
> (iii) the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made; or (iv) the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties. For the purpose of (b)(iii) and (iv) of this subsection, the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances. **Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat**.

RCW 9A.46.020(2)(b) (emphasis added).

The State charged Mr. Bradley with two counts of felony harassment. CP 3-4. In count one, the State alleged Mr. Bradley committed felony harassment for making a threat to kill. CP 3. In count two, the State alleged Mr. Bradley committed felony harassment because the threat was directed at a police officer who was performing his official duties at the time of the threat or in response to an action taken or decision made by the officer during the performance of his official duties. CP 4. The judge found him guilty on both counts, but the court later vacated count one on the State's motion. CP 11, 12, 35, 36.

It was undisputed at trial that Mr. Bradley did not have the current ability to carry out the threat he made, as he was handcuffed and in the back of the police vehicle at the time. RP 35. In its written findings, the trial court found only that Officer Pitman believed Mr. Bradley "had the future ability to carry out his threats." CP 35. The evidence, and the court's finding, was insufficient to support Mr. Bradley's conviction.

a. The felony harassment statute requires that it be apparent to the criminal justice participant that the person making the threat had the present *and* future ability to carry it out.

This Court's objective when interpreting a statute is to determine the legislature's intent. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Where a statute is plain on its face, "the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). This Court may determine a statute's plain language by examining the statute in which the provision is found, related provisions, and the larger statutory scheme as a whole. *State v. Larson*, 184 Wn.2d 843, 365 P.3d 740 (2015) (citing *Ervin*, 169 Wn.2d at 820).

The Court may look no further than the plain language unless it determines the provision at issue is susceptible to more than one reasonable interpretation. *Ervin*, 169 Wn.2d at 820 (citing *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)). Where more than one interpretation is merely *conceivable*, the statute is not ambiguous. *State v. Velasquez,* 176 Wn.2d 333, 336, 292 P.3d 92 (2013) (citing *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392

(1996)). If the plain language is unambiguous, the Court's inquiry ends. *State v. K.L.B.*, 180 Wn.2d 735, 739, 328 P.3d 886 (2014).

The plain language of RCW 9A.46.020(2)(b), which states that "[t]hreatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat," is not ambiguous. The statute plainly states that it must appear to the officer that the individual has both the present ability to carry out the threat *and* the future ability to carry out the threat.

However, even if this Court were to find ambiguity in the statute's language, the canons of statutory construction also require this Court to adopt Mr. Bradley's interpretation. First, when examining statutory language "the legislature is deemed to intend a different meaning when it uses different terms." *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). "Just as it is true that the same words used in the same statute should be interpreted alike, it is also well established that when 'different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.' " *Simpson Inv. Co. v. State, Dept. of Revenue*, 141 Wn.2d 139,

160, 3 P.3d 741 (2000) (quoting *State ex rel. Public Disclosure Comm'n v. Rains*, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976)).

The language in RCW 9A.46.020(1)(a)(i) and (1)(b) states that an individual is guilty of misdemeanor harassment if he threatens to cause "bodily injury immediately *or* in the future to the person threatened *or* to any other person" and "[t]he person by words *or* conduct places the person threatened in reasonable fear that the threat will be carried out." Thus, within the same statute, the legislature chose to use the word "or" when it meant one or the other. Its decision to use the word "and," rather than "or," in subsection (2)(b) indicates it did not intend for the requirement that a person have "the present and future ability to carry out the threat" to be interpreted as "the present *or* future ability to carry out the threat." This Court should give effect to the plain reading of the statute and find that use of the word "and" requires the State to prove both a present *and* future ability to carry out the threat.

In addition, the rule of lenity requires the Court to construe the statute strictly against the State and in favor of Mr. Bradley. *State v. Conover*, 183 Wn.2d 706, 712, 355 P.3d 1093 (2015); *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). The rule of lenity is a

critical safeguard against corruption and the State's abuse of power. *See State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724 (2013) (citing *State v. Rice*, 174 Wn.2d 884, 901, 279 P.3d 849 (2012)). It "helps further the separation of powers doctrine and guarantees that the legislature has independently prohibited particular conduct prior to any criminal law enforcement." *Evans*, 177 Wn.2d at 193 (citing *United States v. Bass*, 404 U.S. 336, 348-49, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971)) (other internal citations omitted).

Thus, a court may interpret a criminal statute adversely to a defendant only where "statutory construction 'clearly establishes' that the legislature intended such an interpretation." *Evans*, 177 Wn.2d at 193 (quoting *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009)). This has not been established here. The legislature carved out a specific exception for criminal justice participants, and specifically used the word "and" when it had chosen to use "or" elsewhere in the statute. This demonstrates a reading of the statute that permits a conviction for felony harassment based only on an individual's future ability to carry it out is not "clearly established." *See Evans*, 177 Wn.2d at 193-94. The rule of lenity requires this Court to adopt the interpretation that favors Mr. Bradley.

In *State v. Boyle*, Division One failed to consider either of these rules of statutory construction when it found the State was not required to prove the individual had both the present and future ability to carry out the threat. 183 Wn. App. 1, 11-12, 335 P.3d 954 (2014). In *Boyle*, the trial court eliminated "the present and future" language when instructing the jury, informing the jurors simply that "[i]t is not harassment if it is apparent to the criminal justice participant that the person does not have the ability to carry out the threat." *Id*. at 10. Division One affirmed Mr. Boyle's felony harassment conviction, rejecting his claim that the statute required the State to prove both a present and future ability to carry out the threat after it determined adopting Mr. Boyle's interpretation would produce "absurd results." *Id*. at 12.

This decision was misguided. As our supreme court held in *Five Corners Family Farmers v. State*:

> Application of the absurd results canon, by its terms, refuses to give effect to the words the legislature has written; it necessarily results in a court disregarding an otherwise plain meaning and inserting or removing statutory language, a task that is decidedly the province of the legislature.

173 Wn.2d 296, 311, 268 P.2d 892 (2011). Because this canon of statutory construction raises separation of powers concerns, a result

may be held absurd only where it is *inconceivable*. *Id.*; *Ervin*, 169 Wn.2d at 824.

Division One apparently found it inconceivable that certain threats, such as electronic threats, threats to third persons outside the speaker's presence, or threats only of future harm, would not "be actionable" under an interpretation that required the State to demonstrate both a present and future ability to act against a criminal justice participant. *Boyle*, 183 Wn. App. at 12. However, this analysis ignores the fact that such threats still may be prosecuted under subsection (1)(a) and can still result in a felony conviction if the threat is to kill or is made against a prior victim. RCW 9A.46.020(2)(b).

In addition, "criminal justice participants" include law enforcement, prosecutors, correctional officers, indeterminate sentence review board members, witness advocates, and defense attorneys. RCW 9A.46.020(4). Thus, a criminal justice participant is an individual who, through his or her chosen profession, regularly comes into contact with people who are in crisis or experiencing the very worst moments of their lives. It is *conceivable* the legislature would have decided that, under these circumstances, a threat that did not involve a prior victim or a threat to kill rises to the level of a felony

only where the person making the threat has the present ability to carry it out.

In *Boyle*, Division One also failed to consider other critical rules of statutory construction, including that different words used in a statute are presumed to mean different things, and that the rule of lenity requires the Court to adopt the construction that favors the defendant unless it is clearly established otherwise. This Court should give effect to the legislature's plain, unambiguous statement and find that RCW 9A.46.020(20(b) requires the State to prove it was apparent to the officer that the individual had the present *and* future ability to carry out the alleged threat.

b. Because the evidence did not show, and the trial court did not find, that Mr. Bradley had the present ability to carry out the threat, this Court must reverse and dismiss Mr. Bradley's conviction for felony harassment.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Winship*, 397

U.S. at 358; U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

If the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *State v. Lee*, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds by *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)).

At the time Mr. Bradley made the threat against Officer Pitman, he was handcuffed in the back seat of the patrol car. RP 35. The State did not prove that Mr. Bradley had the present ability to carry out the threat directed at Officer Pitman, and the trial court did not make this finding. CP 35. Mr. Bradley's conviction must be reversed and dismissed.

F. CONCLUSION

This Court should reverse and dismiss Mr. Bradley's conviction because the State did not prove beyond a reasonable doubt that Mr. Bradley committed felony harassment against a criminal justice participant.

DATED this 24th day of July, 2017.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, Respondent, v. ANTONIO BRADLEY, Appellant.	)))))))))	NO. 49845-6-II

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